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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Teleflex Incorporated

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Serial No. 76279966

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George A. Smith, Jr. of Howson & Howson for Teleflex Incorporated.

Toni Y. Hickey, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

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Before Simms, Seeherman and Chapman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Teleflex Incorporated has appealed from the final refusal of the Trademark Examining Attorney to register EASY CATH for "urinary catheters."[1] Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15

[1] Application Serial No. 76279966, filed July 3, 2001, and asserting first use and first use in commerce on October 30, 1992.

U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark E-Z-CATH, previously registered for "intravenous cannula placement units,"[2] that, when used on applicant's identified goods, it is likely to cause confusion or mistake or deception.

Applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

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[2] Registration No. 850,663, issued June 11, 1968; Section 8 affidavit accepted; Section 15 affidavit acknowledged; renewed. This registration claims a date of first use in commerce of January 31, 1967. The registration was originally issued to Deseret Phamaceutical Company, Inc, of Sandy, Utah, but Office records show the current owner as Becton, Dickinson and Company of Franklin Lakes, New Jersey.

With respect to the marks, they are virtually identical. They are, in fact, identical in pronunciation and connotation, and they are virtually identical in appearance. The "E-Z" which begins the cited mark is an easily recognized alternative spelling for the "EASY" of applicant's mark, and both marks end with the identical "CATH."

With respect to the goods, there are clear similarities between catheters and cannulae. The Examining Attorney submitted definitions of “cannula” and “catheter.” A cannula is defined as "a flexible tube, usually containing a trocar at one end, that is inserted into a bodily cavity, duct, or vessel to drain fluid or administer a substance such as a medication."[3] A catheter is defined as "a hollow, flexible tube for insertion into a body cavity, duct, or vessel to allow the passage of fluids or distend a passageway. Its uses include the drainage of urine from the bladder through the urethra or insertion through a blood vessel into the heart for diagnostic purposes."[4] The Internet materials submitted by the Examining Attorney also show that there is a close

[3] The American Heritage Dictionary of the English Language, 3d ed © 1992.
[4] Id.

relationship between cannulae and catheters in general, and to some extent the terms are used interchangeably. See, for example, the following:

> Cannulation of Blood Vessels
>
> What is a cannula?
> Intravenous therapy, or I.V. for short, is a method for administering fluids and or medications directly into the venous system, usually into a patient's vein. This is a primer, giving a brief description of most of the basic devices and concepts used in the administration of I.V. fluids.
>
> You must have venous access before you can administer I.V. fluids. The most common method is with an I.V. catheter, technically known as a "catheter over needle" (emphasis in original)
>
> ...
>
> After the catheter is inserted into the vein, the needle is withdrawn, leaving only the semi-flexible catheter in the vein. This method is safer and more comfortable than a traditional metal needle, since only the catheter is left in the vein. There is very little danger of the catheter breaking off.
>
> The catheter itself is nothing more than a tube, made from Teflon or other synthetic material.
>
> ...
>
> What are the problems of cannulation at present?
> A technique to place a catheter was explained by Dr. Seldinger in 1953 and the technique of using cannula placement manually by the doctors was

> introduced in 1960. The main aim of this procedure is to place a catheter (silicone rubber tube) in the lumen of blood vessels. www.users.bigpond.com/redpony/cancan.htm

Of course, applicant's identified “urinary catheters” are a specific type of catheter used for a specific purpose, and this purpose is different from the "intravenous cannula placement units" identified in the cited registration. It is thus clear that applicant's goods and those of the registrant would not be used interchangeably. However, the question we must determine is not whether consumers are to mistake the goods, but whether they will mistake the source of the goods.

The Examining Attorney has submitted third-party registrations which show that the goods are related. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). We note that certain of the third-party registrations made of record by the Examining Attorney are based on Section 44, rather than use, (e.g., Registration No. 2,619,737 for JOMED) and we also note that some of the registrations are

for catheters which are specifically different from the urinary catheters identified in applicant's application (e.g., Registration No. 2,540,091 for balloon catheters; Registration No. 2,542,310 for catheters for use in cardiac surgery). However, there are several third-party registrations which list catheters in general, and therefore can be assumed to include urinary catheters. See, for example, Registration No. 2,610,323 for EMBOL-X for, inter alia, medical devices, namely cannulas, catheters, introducers for use in medical procedures; Registration No. 2,517,890 for SEMLER TECHNOLOGIES for surgical instruments and tools for medical use, namely, catheters, cannulae, sheaths...; and Registration No. 2,430,215 for VAS-CATH for medical devices, namely, catheters and cannulae and procedure kits and trays for use with such catheters and cannulae.

Applicant has asserted in its brief that these third-party registrations do not, in fact, include urinary catheters. For example, applicant contends that the catheters involved in the EMBOL-X registration must be for vascular use because the mark EMBOL-X is suggestive of the avoidance of emboli, which occur in blood vessels. With respect to the SEMLER TECHNOLOGIES registration, applicant argues that the terms "instruments" or "tools" would not be

apt descriptions of urinary catheters, while, in connection with the VAS-CATH registration, applicant asserts that because trays are unnecessary in the case of urinary catheters, the catheters identified in that registration do not include urinary catheters.

We are not persuaded by applicant's arguments. The EMBOL-X registration contains no limitation on the type of catheters covered by that registration, and we decline to read in such a limitation by speculating on what the registered mark might suggest. As for the SEMLER TECHNOLOGIES registration, whether or not "medical devices" might be a more appropriate general introductory phrase than "medical tools," it is clear from the items named thereafter, "catheters, cannulae, sheaths, needles, cutlery, hand-held and structurally supported clamps such as artery clamps, and attachments for all of the above," that "medical tools" does not act to limit the type of catheters covered by the registration. Finally, the inclusion of "trays for use for such catheters and cannulae" in the VAS-CATH registration does not mean that the catheters and cannulae listed in the registration must be items which are used with trays. We also point out that there is no evidentiary support for applicant's statement that urinary catheters cannot be used with trays.

Thus, the third-party registrations establish that goods of the type identified in applicant's application and the cited registration may be sold by the same entities under a single mark.

We also see no reason why urinary catheters and intravenous cannula placement units cannot be used by the same personnel on a single patient during a single treatment. For example, a patient may need to have a urinary catheter inserted at the same time as a cannula is inserted for I.V. introduction of fluids. It is also possible that a sedative or anesthetic may be administered by I.V. in order for a urinary catheter to be inserted.

Applicant's and the registrant's goods are also sold to the same classes of purchasers. It is true that these common purchasers are medical or hospital personnel, and therefore more sophisticated than the general public. However, even sophisticated purchasers are not immune from confusion, particularly here, where the marks are virtually identical and there is evidence that these types of goods can emanate from a single source.

In arguing against the likelihood of confusion, applicant points to the declaration of John Randall Golden, the Director of Marketing of Urology at Inmed Corporation, a subsidiary of applicant. Mr. Golden states, inter alia,

that EASY CATH urinary catheters have been sold since 1992; that from 1992-2002 3 million units of the catheters, worth $1.5 million, have been sold throughout the United States; that neither the current or original registrant has objected to applicant's use of EASY CATH; and that no instances of actual confusion between applicant's EASY CATH catheters and the registrant's E-Z-CATH intravenous cannula placement units have come to his attention.

Although evidence of actual confusion may play a strong role in finding likelihood of confusion, the absence of such evidence does not have the same effect. See In re Majestic Distilling Company, Inc., supra. In this case, we do not have any information from the registrant as to its experience with actual confusion. Further, although Mr. Golden has stated in general terms that applicant's urinary catheters have been sold "in substantial quantities throughout the United States," his declaration does not detail the years in which substantial quantities were sold throughout the United States, such that we can determine whether applicant's goods and the registrant's goods were sold in any great quantities within the same localities. Moreover, one of the primary methods in which instances of actual confusion come to the attention of a company is through complaints. Applicant's goods may well not have

generated any complaints, particularly in view of the fact that they are quite inexpensive items, with the units selling for an average of 50¢ each (3 million units sold for $1.5 million).

In conclusion, in view of the strong similarity of the marks, the evidence of relatedness of the goods, and the common purchasers of the products, we find that applicant's use of EASY CATH for urinary catheters is likely to cause confusion with the registered mark E-Z-CATH for intravenous cannula placement units. Any doubts on this issue must be resolved in favor of the registrant, who registered its mark more than twenty years before applicant adopted EASY CATH as its mark. See TBC Corp. v. Holsa Inc., 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997); In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.